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IN THE
Supreme Court of the United States

AVONDALE FEDERAL SAVINGS BANK,

Petitioner,

v.

AMOCO OIL COMPANY, a Maryland corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May the District Court's equitable power to order restitution be invoked if, after filing a complaint that states a proper cause of action under the Resource Conservation and Recovery Act, plaintiff acts unofficiously in an emergency, with notice to the defendant who refuses to act, to abate contamination caused by defendant's abandoned underground tanks?

STATEMENT PURSUANT TO RULE 29.6

Petitioner is Avondale Federal Savings Bank, which merged into Manufacturers Bank while this litigation was pending. Manufacturers Bank is wholly owned by its parent, MB Financial, Inc., a publicly held company. Respondent is Amoco Oil Company. Amoco's parent company is BP Amoco Company.

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Petitioner, Avondale Bank, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Avondale Federal Savings Bank v. Amoco Oil Company*, 170 F.3d 692 (7th Cir. 1999) (App. A). The opinion of the District Court is reported at *Avondale Federal Savings Bank v. Amoco Oil Company*, 997 F. Supp. 1073 (N.D. Ill. 1998) (App. C).

STATEMENT OF JURISDICTION

On April 21, 1998, Avondale filed a timely notice of appeal from the District Court's March 24, 1998 opinion and order (App. C). The Court of Appeals affirmed the District Court's ruling on March 11, 1999 (App. A) and denied the petition for rehearing on April 20, 1999, amended May 4, 1999 (App. E).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The District Court has jurisdiction under 28 U.S.C. § 1331 and Section 7002(a)(1)(B) (the "citizen suit" provision) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(B).

STATUTORY PROVISION INVOLVED

The RCRA citizen suit provision provides:

> [A]ny person may commence a civil action on his own behalf — (B) against any . . . past or present owner or operator of a treatment, storage, or disposal facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment;
>
> * * *
>
> The district court shall have jurisdiction . . . to restrain any person who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(b), [or] to order such person to take such other action as may be necessary. . . .

42 U.S.C. § 6972(a)(1)(B).

STATEMENT OF THE CASE

In late 1995, Avondale discovered that property it had acquired through merger with another bank was contaminated with petroleum, though Avondale had never operated a gasoline station on the property. Avondale discovered that Amoco had once owned the Lake Forest site, and an Amoco gasoline station had been operated on it

for about 44 years, from 1926 until 1970. Before selling the property, Amoco razed the station but left the storage tanks underground with product in them. Under state and federal law, Amoco remained the "present" owner or operator of the tanks because it was the last party to use them before November 8, 1984. Avondale first found petroleum in the soil at levels exceeding the State's standards for cleanup and in groundwater near migration pathways to off-site properties and then later found the abandoned, corroded tanks filled with a mixture of water and petroleum.

As the District Court acknowledged, Avondale complied with RCRA requirements for stating a proper cause of action for a citizen suit against Amoco. The first requirement was to give 90-day written notice to Amoco so that it could abate without litigation and to specified government authorities so that they could enforce RCRA, thereby preempting a citizen suit. Neither Amoco nor the government authorities acted. The second requirement was to file suit while the contamination might still pose an imminent and substantial endangerment to health or the environment.

On May 8, 1996, Avondale filed a Complaint for Declaratory Judgment and Other Relief in the District Court seeking an order to require Amoco to abate the contamination at its cost. Before Amoco answered, Avondale discovered that the source of the contamination was abandoned and leaking underground storage tanks. Amoco was present when Avondale uncovered the tanks and one of its representatives said, "These are probably our USTs."[1] When the corroded, leaking tanks were uncovered,

1. "UST" is the RCRA acronym for underground storage tank.

Amoco was required by law to report the condition to authorities within 24 hours, propose an action plan, remove the tanks, and abate the contamination. Amoco, however, refused to act. Holding Amoco responsible, Avondale notified authorities, proposed an action plan that was approved, undertook the abatement in accordance with State standards, and completed abatement in November 1996.

Avondale then filed its First Amended Complaint for Declaratory Judgment and Other Relief on October 28, 1996, seeking restitution and adding two common law counts for negligence and unjust enrichment. On February 5, 1997, Avondale, by agreement of the parties, filed its Second Amended Complaint for Declaratory Judgment and Other Relief to change the defendant from Amoco Corporation to Amoco Oil Company. On February 20, 1997, Amoco answered the complaint and asserted a number of affirmative defenses, the second and third of which are relevant here. Amoco's second affirmative defense states that the court lacked jurisdiction or the case was moot because Avondale had completed abatement during litigation and thus the petroleum contamination no longer presented an imminent and substantial endangerment. Amoco's third affirmative defense states that under Counts I and II Avondale was really seeking, not restitution, but compensatory or economic damages, relief that is not equitable and thus is unavailable under RCRA. After Avondale performed on-site abatement during litigation, Amoco moved for summary judgment, asserting an interpretation of *Meghrig v. KFC Western*, 516 U.S. 482 (1996), that would allow it to escape both liability and restitution.

On March 24, 1998, the District Court entered an opinion and order granting summary judgment on Counts I and II in favor of Amoco. The District Court acknowledged that Avondale "properly invok[ed] RCRA's statutory process" but held that RCRA does not authorize restitution to plaintiff for abatement costs incurred during litigation. Electing not to exercise pendant jurisdiction over Avondale's state common law claims, the District Court also dismissed Counts III and IV. The order was corrected and amended on April 6, 1998. The Court of Appeals affirmed in a 2-1 decision, J. Wood dissenting, and denied Avondale's motion for rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S AND THE SEVENTH CIRCUIT'S PRIOR RULINGS ON EQUITABLE JURISDICTION.

Avondale's petition for writ of certiorari should be granted because the opinion below conflicts with this Court's long line of prior rulings on the federal courts' equitable jurisdiction to enforce statutes while protecting the public interest and respecting private interests. This Court granted certiorari in *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), "[b]ecause . . . it posed an important question regarding the power of the federal courts to grant or withhold equitable relief for violations of the FWPCA." This case poses the same question for liability under RCRA.

The general rule about equitable jurisdiction was compellingly enunciated more than fifty years ago in *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946), and has been consistently followed by the Supreme Court and the Seventh Circuit in cases dealing with a wide array of statutes. The rule is that when a statute may be enforced through injunction to compel compliance or restrain violations, the federal courts may also grant other equitable relief as necessary to fit the circumstances — unless Congress clearly says otherwise.

> [T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

Id. at 398. Although the Emergency Price Control Act expressly authorized the District Court only to grant a permanent or temporary injunction, restraining order, or other order, this Court found restitution to be available because Congress had not constrained the courts' powers to grant complete relief in enforcing the statute. *Porter* followed *The Hecht Company v. Bowles*, 321 U.S. 321, 329 (1944), where this Court said that if Congress intended a drastic departure from the traditions of equity practice, "an unequivocal statement of its purpose would have been made."

Under *Porter*, the power to do equity trumps any inference about congressional silence on the scope of equitable jurisdiction. Congress cannot foresee every

enforcement circumstance. Though its silence does not strip equitable powers from a District Court, Congress commonly includes "other action" or "other order" language in enforcement provisions to underline the power of federal judges to exercise their discretion broadly, as necessary. Framing equitable orders to fit the circumstances of a particular case, especially where the public interest is threatened, is necessarily a judicial process, not a legislative one. The presumption of judicial discretion is so strong that in *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), this Court held that statutory language mandating an injunction did not constrain the District Court's traditional power to apply its discretion to the circumstances and deny an injunction where appropriate.

When a District Court's equitable jurisdiction is invoked to enforce compliance or enjoin illegal acts, "all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." *Porter*, 328 U.S. at 398. Under case law, "all" equitable powers include freezing of assets, an accounting, disgorgement, mandamus, contract recision, restoration of the status quo, and restitution. Restitution allows a court to "act in the public interest by restoring the status quo and ordering the return of that which rightfully belongs 'to another party.' " *Porter*, 328 U.S. at 402.

The *Porter* rule, if it may be called that, has been applied to a wide variety of statutes that, like RCRA, are based in equity but do not mention restitution, neither affirmatively authorizing it nor limiting its availability. Examples of statutes that are like RCRA in this sense and cases granting restitution and other equitable relief under them are legion:

- the Federal Trade Commission Act, *FTC v. World Travel Vacation Brokers*, 861 F.3d 1020 (7th Cir. 1988);

- Section 15 of the Rivers and Harbors Act, *Wyandotte Transportation Co. v. United States*, 389 U.S. 191 (1967);

- the Investment Advisors Act, *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979);

- the Federal Water Pollution Control Act, *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982);

- the Emergency Price Control Act of 1942, *The Hecht Company v. Bowles*, 321 U.S. 321 (1944), and *Porter*;

- the Employee Retirement Income Security Act, *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993); and

- the Commodity Exchange Act, *Commodity Futures Trading Commission v. Nelson Bunker Hunt*, 591 F.2d 1211, 1219, 1221 (7th Cir. 1979).

The notable difference between these statutes and RCRA is that the prerequisite to a RCRA suit is the existence of contamination so harmful that it may constitute an imminent and substantial endangerment to health or the environment. As it did in this case, the contamination, depending on the circumstances, is very likely to trigger

immediate legal responsibilities and emergency action during litigation, requiring one of the parties to act before there can be a trial on the merits, with attendant delays for discovery and appeal. For the congressional policy of quick abatement to work when time is of the essence but liability has not yet been conclusively established, each party needs to know that restitution is available if it prevails later on liability. Thus, the availability of restitution is even more important under RCRA than under most statutes, and it is just as important to defendants as to plaintiffs.

The court below adopted the reverse of the general rule, holding that RCRA does not allow restitution because Congress explicitly mentioned only mandatory injunctions and restraining orders. App. A, 5a. This holding contravenes the general rule about the breadth of equitable jurisdiction when Congress does not limit it explicitly or by inescapable inference. This holding also truncates RCRA's actual enforcement mechanisms. Four are expressly mentioned, one of which is to require defendant to take such "other action" as may be necessary. 42 U.S.C. § 6972(a). Restitution, like disgorgement and the freezing of assets, is action, physically different from abatement but legally still action in that it requires the payment of money in compliance with an order. *Porter*, 328 U.S. at 402. "An order for the recovery and restitution of illegal rents may be considered a proper 'other order'. . . ." *Id.* at 399.

Like this Court, the Seventh Circuit has applied the *Porter* rule on equitable jurisdiction in a variety of statutes where Congress did not expressly provide for restitution. The Federal Trade Commission Act, for example, authorizes the issuance of a permanent injunction to restrain violations, but it has been interpreted by the Seventh Circuit to allow

such additional equitable relief as freezing assets, rescinding contracts, and requiring restitution. *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020 (7th Cir. 1988), and *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564 (7th Cir. 1989). Section 13(b) of the Act, which authorizes a court to grant a permanent injunction, "by implication gives authority 'to grant any ancillary relief necessary to accomplish complete justice because it did not limit that traditional equitable power explicitly or by necessary and inescapable inference.' " *Id.*, *quoting FTC v. H.N. Singer*, 668 F.2d 1107 (9th Cir. 1982).

II.

THE PETITION SHOULD BE GRANTED BECAUSE RESTITUTION IS IMPORTANT TO THE INTEGRITY AND ADMINISTRATION OF RCRA.

Avondale's petition should be granted because restitution is important to the integrity and administration of RCRA. This Court granted certiorari in *Hecht v. Bowles* "because of the importance of the problem [of interpreting a statute to limit the District Court's discretion to grant or deny an injunction] in the administration of the Act." 321 U.S. at 326.

The general purpose of RCRA's underground storage tank provisions is to safeguard health and the environment by requiring prompt abatement of dangerous petroleum contamination. The only persons responsible for abating at their cost are the past and present tank owners and operators. 42 U.S.C. § 6972(a)(1)(B). Amoco did not violate any federal statute when it left the tanks behind in 1970 (nor did the complaint allege otherwise), but in 1996 when

the tanks were discovered to be contributing to dangerous contamination, Amoco had a RCRA duty to remove the tanks and abate the contamination at its cost. Because Amoco did not act after notice, federal and state government authorities could have sued to enforce RCRA and, failing that, Avondale was authorized to sue for an order requiring abatement.

Avondale discovered the emergency requiring 24-hour reporting and prompt action before there was time to establish liability in court — in fact, months before Amoco even answered. Avondale acted to protect both the public interest and its own private interests in the real estate, but only under protest after Amoco saw the leaking tanks and refused to act. Had the scenario been the obverse — Amoco abating in an emergency, without a prior determination of liability but under a reservation of rights — it would have been entitled to a hearing on liability and, if the result had been unfavorable to Avondale, Amoco could have sought restitution for the benefit it had unofficiously conferred upon Avondale. Why then should restitution not be mutually available?

Though Avondale met the standard for restitution, the District Court said restitution would "undermine the methodology that Congress employed to safeguard human health and the environment." RCRA policy strongly suggests otherwise.

> Congress in the endangerment provisions of RCRA . . . sought to invoke nothing less than the full equity powers of the federal courts in the effort to protect public health, the environment, and public water supplies from the

> pernicious effects of toxic wastes. Courts should not undermine the will of Congress by either withholding relief or granting it grudgingly.

United States v. Price, 688 F.2d 204, 214 (3d Cir. 1982). Restitution has been found important to support Congress' enforcement methods in many statutes. *Porter* enunciates two theories to justify restitution, one of which is applicable here. Restitution may be "an order appropriate and necessary to enforce compliance with the Act." "In framing [appropriate equitable remedies for specific situations], courts must act primarily to effectuate the policy of the . . . Act and to protect the public interest while giving necessary respect to the private interests involved. . . . Future compliance may be more definitely assured if one is compelled to restore one's illegal gains." *Porter*, 328 U.S. at 400.

Unless the benefit conferred upon Amoco under protest during litigation is restored to Avondale upon a finding of Amoco's liability, future compliance with RCRA will be anything but assured, for plaintiffs in Avondale's position and defendants in Amoco's will be motivated to do nothing rather than protect the public interest as Congress intended. Inaction generated by denial of restitution to plaintiff is not only dangerous to the public but is disrespectful toward the private interest in the highest and best use of property. The equitable powers of the district courts are broad enough to avoid such unfortunate results because they "assume an even broader and more flexible character than when only a private controversy is at stake." *Id.* at 398.

III.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S OPINION IN *MEGHRIG* DISTINGUISHING BETWEEN CAUSE OF ACTION AND RELIEF.

In *Meghrig*, this Court decided that the prerequisite for stating a proper RCRA cause of action to invoke the District Court's jurisdiction is the existence of contamination that may cause imminent and substantial endangerment to health and the environment. KFC Western did not qualify because it had abated petroleum contamination years before filing suit against the Meghrigs. Without a way to invoke the District Court's jurisdiction, KFC Western, of course, had no way to get any relief. The *Meghrig* case is limited to KFC Western's peculiar facts, as this Court carefully acknowledged near the end of the opinion.

The lower court and Amoco, however, interpret *Meghrig* as if it had decided an issue not then before this Court — that is, the kind of equitable relief that a District Court could award if a proper cause of action had been stated and its equitable jurisdiction had thus been properly invoked. The misinterpretation seems to rest on this Court's use of the word "remedy" in the *Meghrig* opinion sometimes to mean cause of action and sometimes to mean relief. In common usage, "remedy" has both meanings, and the distinction is not always clear (although in *Meghrig* the context makes the meaning clear enough). In *Franklin v. Gwinnett County Public Schools*, 403 U.S. 60, 66 (1992), this Court noted that the federal courts "do not always distinguish clearly between a right to bring suit and a remedy available under such a right." In *Bell v. Hood*, 327 U.S.

678, 648 (1946), quoted with approval in *Franklin*, this Court said that the distinction between a cause of action and an available remedy was a jurisdictional rule and " 'upheld the exercise of the federal courts' power to award appropriate relief so long as a cause of action existed under the Constitution or laws of the United States.' " *Franklin*, 403 U.S. at 66.

In *Meghrig*, this Court carefully noted that it was not deciding the kind of relief that would be available to a plaintiff like Avondale who stated a proper RCRA cause of action and then sought restitution for post-complaint costs because those facts were not before it:

> Without considering whether a private party could seek to obtain an injunction requiring another party to pay cleanup costs which arise after a RCRA citizen suit has been properly commenced, . . . or otherwise recover cleanup costs paid out after the invocation of RCRA's statutory process, ...

Meghrig, 516 U.S. at 487-88. This limitation has led to confusion, though it is easy enough to understand if one considers the context, the facts of the case, this Court's prior rulings in cases like *Franklin* and *Bell* on the distinction between cause of action and relief, and the two cases this Court cited in support of its holding, *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981), and *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979). In *Middlesex*, the private citizen sought compensatory and punitive damages under "a wide variety of legal theories" for defendants' failure to protect the ocean from pollution. One of the theories loosely

connected defendants' alleged failure to enforce the Clean Water Act to the damage that plaintiffs' fishing grounds had suffered. Not surprisingly, this Court found that RCRA has no mechanism for stating a cause of action for damages. Citing *Transamerica*, this Court said that a court must be chary of reading remedies — meaning causes of action — into an act other than those expressly provided.

Amoco argued below that a properly stated cause of action under RCRA becomes moot and is no longer justiciable if the dangerous contamination or the violation that gave rise to the suit is cured during litigation, even if it is plaintiff that unofficiously cures under protest. But even in a garden-variety scenario where defendant (not plaintiff) cures, the Seventh Circuit found otherwise in *Atlantic States Legal Foundation, Inc. v. Stroh Die Casting Co.*, 116 F.3d 814 (7th Cir. 1997). Defendant's partially successful efforts to come into compliance after a citizen suit was filed were found not to moot the cause of action but merely to change the kind of relief that plaintiff could obtain.

Alternatively, Amoco argued in circular fashion that once the danger had been abated, plaintiff's only relief was money damages unavailable in equity. This argument ignores the distinction between damages — a remedy at law measured by plaintiff's loss — and restitution — an equitable remedy, *Mertens*, 508 U.S. at 261, measured by defendant's benefit. A cause of action that properly invokes the court's equitable jurisdiction invokes the court's full range of equitable powers, and a prayer for restitution under those circumstances is not a damage claim. ERISA, a statute structured for enforcement like RCRA, has been held not to allow a claim for money damages but, where appropriate, to allow equitable relief, including restitution of ill-gotten assets or profits. *Id.*

The opinion below seizes the wrong end of the jurisdictional stick, putting relief before cause of action: "Congress deliberately limited RCRA's remedies to injunctive relief — more specifically, injunctive relief obtained before the property is cleaned up, while the danger to health or the environment is 'imminent and substantial.' " In this sentence the Seventh Circuit blurs the distinction between cause of action and injunctive relief and glosses over the fact that Avondale stated a proper cause of action, originally seeking injunctive relief in the form of abatement, a prayer transmuted by force of circumstances into one for restitution. The effect of the Seventh Circuit's interpretation of RCRA and *Meghrig* is to force the danger, even in an emergency, to continue until discovery and a preliminary hearing have occurred and appeals have been exhausted, a result that no reading of RCRA suggests was intended by Congress, which envisioned quick abatement at defendant's expense.

The lower court believed Avondale was asking that a new remedy, meaning cause of action, be read into RCRA, but that cannot be, for even the lower court does not dispute that Avondale stated a proper RCRA cause of action for invoking its equitable powers. Nor does Avondale ask that any legal remedy such as damages be read into RCRA, for it did not eliminate the danger before suit and does not seek any pre-complaint costs. Avondale merely asks that the District Court exercise its traditional equitable power, after a finding of Amoco's liability, to order restitution in the reasonable amount by which Avondale unofficiously, under protest, benefitted Amoco during litigation.

CONCLUSION

This case presents three federal questions of exceptional importance about the breadth of the federal courts' equitable jurisdiction to grant complete relief in enforcing statutes, the integrity of RCRA to implement congressional policy holding tank owners and operators financially responsible for promptly abating petroleum contamination while protecting the public interest and respecting private interests, and this Court's distinction in *Meghrig* between a RCRA cause of action and appropriate equitable relief.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED MARCH 11, 1999

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 98-2003

AVONDALE FEDERAL SAVINGS BANK,

Plaintiff-Appellant,

v.

AMOCO OIL COMPANY, a Maryland corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 C 2762 — **Charles R. Norgle, Sr.**, *Judge.*

ARGUED DECEMBER 4, 1998 — DECIDED MARCH 11, 1999

Before BAUER, DIANE P. WOOD, and EVANS, *Circuit Judges.*

EVANS, *Circuit Judge.* Amoco Oil Company owned and operated a gas station in Lake Forest, Illinois, from 1926 to 1970. Amoco sold the property to George and Margaret Herman, who in turn sold it to First National Bank of Lake Forest, which in turn sold it to Lake Forest Savings and

Loan Association. Avondale Federal Savings Bank took title to the property in 1982 when it merged with Lake Forest Savings and Loan.

In late 1995 Avondale negotiated to sell the property to First Chicago Building Corporation — the first in a long line of parties to insist (wisely, in hindsight) on acquiring the property with a clean bill of health. To satisfy its obligations under the purchase agreement with First Chicago, Avondale had an environmental investigation done on the property, and the study revealed petroleum contamination in the soil. Avondale traced the contamination to Amoco and served Amoco and the appropriate governmental agencies with a 90-day notice letter as required by the Resource Conservation and Recovery Act. Neither the government nor Amoco responded, and in May 1996, after the 90-day notice period expired, Avondale sued Amoco seeking an injunction under § 6972(a)(1)(B) of RCRA requiring Amoco to clean up the property. Later that month, before the court ordered any relief, Avondale excavated and removed three underground storage tanks, associated piping, and a hydraulic oil reservoir from the property. By November 1996 Avondale had cleaned up the soil and remediated the property to meet the Illinois EPA's residential standards, so the IEPA issued a "No Further Remediation Letter" signifying that the property was clean and absolving Avondale of any further remediation responsibility. Avondale's sale to First Chicago then proceeded without a hitch.

Back in court, Avondale changed its request for an injunction (which was no longer needed because the

property was cleaned up) to a claim for restitution to recover the value of the benefit it conferred on Amoco by cleaning up the mess. Avondale still sought an injunction requiring Amoco to clean up any further contamination that might be caused by off-site migration. Amoco moved for summary judgment, arguing that Avondale failed to satisfy RCRA's "imminent and substantial endangerment" requirement. *See* 42 U.S.C. § 6901 *et seq.* The district court granted Amoco's motion. On Avondale's claim for restitution for the on-site contamination cleanup, the court found that it was precluded from awarding the requested relief under *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996). On Avondale's claim for an injunction for off-site contamination, the court found that any threat was not imminent.

On appeal Avondale makes two arguments. First, it argues *Meghrig* does not preclude the relief sought because it cleaned up the property *after* filing its citizen suit and *Meghrig* precludes relief only if the property is cleaned up *before* suit is filed. Second, Avondale argues the district court was wrong to conclude that off- site migration posed no imminent threat. The threat of harm was imminent, Avondale argues, though the effects of the harm might not be felt until later. We are not persuaded by either of these arguments.

In *Meghrig* the Supreme Court painstakingly analyzed the language of RCRA's citizen suit provision and concluded that RCRA "is not directed at providing compensation for past cleanup efforts." 516 U.S. at 484. Instead, RCRA offers a private citizen a choice of two remedies: "a mandatory injunction, i.e., one that orders a

responsible party to 'take action' by attending to the cleanup and proper disposal of toxic waste, or a prohibitory injunction, i.e., one that 'restrains' a responsible party from further violating RCRA." *Id.* "Neither remedy, however, . . . contemplates the award of past cleanup costs, whether these are denominated 'damages' or 'equitable restitution.' " *Id.* We think this precise language in *Meghrig* bars the remedy Avondale seeks.

But Avondale has latched onto the language in the last paragraph of *Meghrig* where the Court also said: "Without considering whether a private party could seek to obtain an injunction requiring another party to pay cleanup costs which arise *after* a RCRA citizen suit has been properly commenced, . . . or otherwise recover cleanup costs paid out *after* the invocation of RCRA's statutory process, we agree with the Meghrigs that a private party cannot recover the cost of a past cleanup effort under RCRA. . . ." *Id.* at 488 (emphasis added). This is the precise language Avondale thinks saves it from defeat.

We think reading this sentence in isolation and to the exclusion of the rest of the opinion — which is what we have to do for Avondale to prevail — betrays the Supreme Court's resounding message. The entire opinion, save this one sentence, emphasizes that in interpreting RCRA we need to take Congress at its word and that we must "be chary of reading" additional remedies into a statute that, like RCRA, expressly provides for a particular remedy. *Id.* at 488 (quoting *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981)). The dissent is willing to read an additional remedy into

RCRA — namely, reimbursement of cleanup costs. But we are not. Congress deliberately limited RCRA's remedies to injunctive relief — more specifically, injunctive relief obtained before the property is cleaned up, while the danger to health or the environment is "imminent and substantial." 42 U.S.C. § 6972(a)(1)(B). Neither *Meghrig* nor RCRA can be read to allow a party to recover cleanup costs. And, neither *Meghrig* nor RCRA exempts from that principle cleanup costs incurred after RCRA is invoked. Given the Supreme Court's admonition that we must strictly follow RCRA's statutory scheme, we are unwilling to accept Avondale's invitation to expand RCRA's remedial reach. Quite simply, RCRA's remedial scheme could have worked here. Avondale properly invoked the scheme by filing suit for an injunction before taking any action to clean up the property. But Avondale got antsy and chose not to wait for the wheels of justice to spin. It made a business decision to clean up the property quickly so it could close the deal with First Chicago. That decision allowed Avondale to take advantage of a business opportunity that may very well have evaporated by the time any injunction issued. But it doesn't change RCRA's remedial scheme.

In short, although *Meghrig* may have left an opening for private remedies to redress cleanup costs that arise after a RCRA citizen suit is filed, Avondale cannot squeeze through in this instance. No matter how it categorizes its claim, Avondale wants to get back from Amoco the money it spent to clean up the contamination it thinks Amoco caused. While this certainly seems fair, it is simply not allowed under RCRA. Avondale may still get money from Amoco — but not in this court and not under RCRA.

Appendix A

Avondale has a number of state law recovery theories available to it and, in the end, justice can be done.

Avondale's claim for an injunction requiring Amoco to clean up off-site contamination also fails, though for a different reason. Here, Avondale sought the right relief — a mandatory injunction — but the claim was premature under RCRA. Avondale's own expert testified that **"if excavation is ever performed** under the streets adjacent to the property, petroleum contamination will be found at levels requiring abatement to protect health and the environment." (Emphasis added.) Thus off-site contamination may very well present an imminent and substantial danger at some point, but it does not present such a danger right now.

For these reasons, we affirm the district court's entry of summary judgment in Amoco's favor.

Appendix A

DIANE P. WOOD, *Circuit Judge*, concurring in part and dissenting in part. No one would disagree that the result the majority feels constrained to reach today creates perverse incentives for landowners whose property has been contaminated by another party. Feeling bound by the language of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(B), and the Supreme Court's decision in *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996), the majority concludes that landowners who comply with all prerequisites to a suit under RCRA and who file a timely action must nonetheless refrain from conducting any clean-up operations until a court has had time to rule on a motion for an injunction, unless the landowner wants to be stuck with the bill and provide a windfall to the polluter. In my view, nothing in either the statute or *Meghrig* compels such an undesirable result, and I dissent from that part of the court's holding. For the reasons stated in the court's opinion, I agree that Avondale was not entitled to an injunction requiring Amoco to clean up off-site contamination, and I therefore concur in that part of the judgment.

My first point of disagreement is a fundamental one. The majority sees no distinction between the situation presented in *Meghrig*, in which the property owner cleaned up its property before filing suit, and our case, in which Avondale waited to clean up the property until *after* it filed its RCRA action. I disagree. The pre-filing period has independent significance under the statutory scheme Congress created, and a person who tries to circumvent that scheme (like the *Meghrig* plaintiff) has nothing left but a suit for reimbursement of monies spent by the time litigation

begins. The person who complies with the pre-filing requirements RCRA imposes gives the statutory system a chance to work. Furthermore, at the time the suit is filed, the latter person is seeking precisely the injunctive relief that § 6972(a)(1)(B) authorizes. Just because the person attempts to mitigate damages and clean up the property sooner rather than later changes neither of those facts. A look at the pre-filing requirements helps to show why the two cases should be treated differently under the statute.

RCRA imposes several detailed requirements on potential plaintiffs who want to bring suit under its citizen suit provision. A citizen plaintiff must provide notice to the potential defendant and wait 60 days before actually filing suit, so that the defendant may act on its own initiative to clean up the site and thus avoid the costs of litigation to the parties and the environment. See 42 U.S.C. §§ 6972(b), (c). In the *Meghrig* situation, a jump-the-gun plaintiff frustrates this important purpose. In the case before us, in contrast, Avondale fulfilled all of the requirements for filing suit and the defendant, Amoco, indicated that it intended to contest its liability, as it was entitled to do. Avondale therefore filed its complaint on May 8, 1996, seeking declaratory and injunctive relief — precisely the forms of relief that § 6972(a)(1)(B) authorizes. Shortly thereafter, Avondale uncovered some corroded underground storage tanks ("USTs") on the site, which were filled with a gasoline and water mixture. It also found petroleum in the soil at concentrations exceeding state cleanup levels, and it found petroleum in perched groundwater, which acted as a subterranean pathway for off-site migration. An Amoco representative who was present when Avondale uncovered

and removed the USTs commented at the time, "These are probably our USTs."

Only then, after suit was filed and after it realized the gravity of the situation and the potential for further spreading of the hazardous material, did Avondale undertake clean-up measures. It did so (as it was required to do) in accordance with the Illinois Pre-Notice Site Program, which is administered by the Illinois Environmental Protection Agency ("IEPA"). IEPA approved a level of remedial action that met state objectives for circumstances in which groundwater is contaminated and, significantly, off-site migration is likely. On November 20, 1996, IEPA issued a No Further Remediation Letter that released Avondale (but not Amoco) from further responsibility under state law. The letter did not address any action with respect to contaminants not mentioned in the plan or contaminants that had migrated to other sites. Amoco then moved for summary judgment, on the ground that Avondale had foolishly lost its RCRA right to relief by cleaning up the site and preventing any future migration.

While it agrees that the Supreme Court's decision in *Meghrig* did not address the precise question before us, the majority has chosen to extend *Meghrig* to our situation. This is a step I would not take. In *Meghrig*, the question before the Supreme Court was, in its own words:

> whether § 7002 of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6972 (1988 ed.) authorizes a private cause of action to recover the prior cost of cleaning up

> toxic waste that does not, at the time of suit, continue to pose an endangerment to health or the environment.

516 U.S. at 481. It answered that question in the negative, for several reasons. First, it noted that the language of § 6972 refers to mandatory and prohibitory injunctions. This could not encompass an award of *past* cleanup costs, the Court held, whether they were labeled "equitable restitution" or "damages." In making this connection, it contrasted the broader language of the citizen suit provision found in the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9659(c), and found that the lack of language in RCRA permitting recovery of past cleanup costs was a clear sign from Congress about the scope of the two laws. Second, the Court pointed out that the need for imminent action implicit in the RCRA scheme has plainly passed for a parcel that has been cleaned up, when the only remaining dispute is about money. RCRA also lacks a statute of limitations — a serious concern if one is talking about *past* expenditures, as opposed to something that happens *after* suit is filed — and it does not contain an express provision requiring that the response costs sought must be reasonable.

At the end of its opinion, the Court emphasized that its ruling was not intended to address the distinct question before us today. Again, it is best to let the Court speak for itself:

> Without considering whether a private party could seek to obtain an injunction requiring

> another party to pay cleanup costs which arise after a RCRA citizen suit has been properly commenced, . . . or otherwise recover cleanup costs paid out after the invocation of RCRA's statutory process, we agree with the Meghrigs that a private party cannot recover the cost of a past cleanup effort under RCRA, and that KFC's complaint is defective for the reasons stated by the District Court.

516 U.S. at 488 (citation omitted). In my view, when the Supreme Court cautions us not to interpret its decision in a certain way, we should take heed. The language just quoted makes it clear that the Court saw distinctions between the recovery of pre-filing cleanup costs and the recovery of post-filing cleanup expenses. Here, when Avondale filed its suit, it was plainly eligible for an injunction requiring Amoco to clean up the site (assuming, obviously, that it could prove Amoco's liability on the merits). At that point, § 6972 empowered the district court not only to order responsible parties to clean up hazardous waste sites, but also "to order such person to take such other action as may be necessary." 42 U.S.C. § 6972. This is hardly what one would call constraining language. To the contrary, it indicates to me that once the court's equitable jurisdiction was properly invoked, the full range of equitable remedies were available to the court. If the plaintiff found it necessary to clean up some or all of the property while the suit was pending, the court could order the wrongdoer to make equitable restitution of that amount by which it had been unjustly enriched. In this context, it is important to note that the measure of unjust enrichment would not necessarily be

equal to the amount the plaintiff spent. If a property owner took actions that the court would not have required of the wrongdoer, whether those were extra studies, remediation to standards that were too strict, or wasteful scheduling, those actions would not have unjustly enriched the wrongdoer, and thus there would be no call for equitable restitution. (A damages remedy, in contrast, would put the plaintiff in the position it would have enjoyed had it not been for the wrong, which is quite a different matter.) I read the Court's rejection of equitable restitution in *Meghrig* to mean only that one cannot avoid RCRA's pre-filing requirements and re-label a damages claim as restitution, and remain true to the language of the statute.

Nothing in *Meghrig* answers another important question, which also points in the direction of allowing the present action. It provides no guidance about whether the category of "past cleanup efforts" for which private citizens cannot recover costs should be defined by reference to the time at which the suit is filed or the time judgment is entered. The choice of one approach over the other is not without consequence. By definition, the hazardous waste sites to which RCRA applies pose an "imminent and substantial endangerment to health or the environment," and therefore the extra time that passes between the filing of a lawsuit and the issuing of a cleanup order may often serve to aggravate an already precarious situation. We should not be blind to the realities of litigation, and one of those realities is that with today's crowded dockets it takes time even to demonstrate an entitlement to a preliminary injunction. Thus the court's holding is particularly ironic because it essentially finds that a statute designed to remedy

imminent and substantial environmental hazards must on occasion operate to exacerbate these hazards rather than to ameliorate them. Foot-dragging is hardly unknown in environmental litigation, whenever a defendant believes that it will be better off if it delays the progress of the case, where losing later simply means it will have to pay later. As the court envisions RCRA's statutory scheme, defendants have an extra incentive to stall because the longer the lawsuit runs, the more likely it is that another party will as a practical matter be forced to take it upon itself to clean up the defendants' messes. In the absence of a clear signal from Congress and the Supreme Court that we are forced to this pass, I cannot read the law this way.

Instead, in my view, if a citizen plaintiff has fulfilled all of the statutory requirements to bring suit under § 6972 and has filed such an action, RCRA permits the plaintiff to clean up the environmental hazard during the pendency of the lawsuit and, upon a finding of liability against the defendant, obtain an order from the court requiring the defendant to pay the plaintiff an amount equal to the cost the court would have imposed on the defendant for clean-up. I therefore respectfully dissent from this part of the judgment of the court.

A true Copy:

Teste:

Clerk of the United States Court
of Appeals for the Seventh Circuit

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED MARCH 11, 1999

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: March 11, 1999

BEFORE: Honorable WILLIAM J. BAUER,
Circuit Judge

Honorable DIANE P. WOOD,
Circuit Judge

Honorable TERENCE T. EVANS,
Circuit Judge

No. 98-2003

AVONDALE FEDERAL SAVINGS BANK,

Plaintiff – Appellant

v.

AMOCO OIL COMPANY, A Maryland Corporation,

Defendant – Appellee

Appendix B

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 96 C 2762, Charles R. Norgle, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED MARCH 19, 1998 AND DOCKETED MARCH 24, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NO. 96 C 2762

HONORABLE CHARLES R. NORGLE

Avondale Federal Savings Bank,

Plaintiff,

v.

Amoco Oil Company, a Maryland corporation,

Defendant.

OPINION AND ORDER

CHARLES R. NORGLE, SR., District Judge:

Before the court is Defendant Amoco Oil Company's Motion for Summary Judgment. For the following reasons, Defendant's motion is granted in part, and denied in part.

Appendix C

I. BACKGROUND[1]

Plaintiff, Avondale Federal Savings Bank ("Avondale"), filed a Second Amended Complaint for Declaratory Judgment and Other Relief against Amoco Oil Company ("Amoco"). In Counts I and II, brought pursuant to the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972, Avondale seeks: (1) recovery of the cleanup costs it incurred investigating and remediating solid or hazardous waste at 300 East Illinois Road, Lake Forest, Illinois ("Property"); and (2) an order requiring Amoco to undertake at its expense "any future action that may be required for residual on-site contamination caused by Amoco's USTs [underground storage tanks] or for contamination that migrated on-site from them." (Pl.'s Resp. at 5.) In Counts III and IV, brought pursuant to state common law, Avondale seeks recovery of the cleanup costs it incurred investigating and remediating solid or hazardous waste at the Property.

From approximately November 19, 1926, to June 26, 1970, Amoco owned a gasoline service station located on the Property. In 1970, Amoco razed the gasoline service station, including all buildings, driveways, and approaches. On June 26, 1970, Amoco transferred the Property via warranty deed to George W. and Margaret M. Herman ("Hermans") who owned the Property from approximately June 26, 1970, to January 2, 1975. On January 2, 1975, the Hermans transferred the Property via warranty deed to First

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1. The following facts are taken from the court's reconciliation of the parties Local Rule 12(M) and 12(N) statements.

National Bank of Lake Forest ("First National") who owned the Property from approximately January 2, 1975, to July 1, 1975. On July 1, 1975, First National transferred the Property via warranty deed to Lake Forest Savings and Loan Association ("Lake Forest"). In December of 1982, Lake Forest merged into Avondale, and Avondale acquired title to the Property. Avondale then improved the Property with a parking lot and a building, and used it as a bank.

In late 1995, in anticipation of selling the Property, Avondale conducted an environmental investigation of the Property. Boelter Environmental Consultants ("Boelter") on November 17, 1995, and EPS Environmental Services, Inc. ("EPS") on April 18, 1996, performed soil borings on the Property. The soil borings allegedly showed that there was petroleum contamination in the Property's soil at concentrations exceeding Illinois' cleanup objectives.

On January 22, 1996, pursuant to RCRA's mandatory notice provision, 42 U.S.C. § 6972(b)(2)(A), Avondale served Amoco with a 90-day "Notice of Endangerment and Notice of Intent to Sue" ("90-day notice") for contributing to petroleum contamination on the Property that may present an imminent and substantial endangerment. Avondale also notified the necessary governmental officials and agencies pursuant to RCRA's mandatory notice provision to give them an opportunity to file a civil action against Amoco; the governmental officials and agencies did not choose to do so.

On January 29, 1996, Avondale entered into a Purchase and Sale Agreement with First Chicago Building

Corporation ("First Chicago") to sell the Property. As a condition of the purchase of the Property, First Chicago required Avondale to deliver the Property in a clean condition without any contamination and a "No Further Remediation Letter" from the Illinois Environmental Protection Agency ("IEPA").

On February 12, 1996, Amoco acknowledged receiving the 90-day notice and requested the environmental records and reports referenced in the 90-day notice; Amoco did not concede any liability or offer to remediate any alleged contamination. Avondale promptly provided the requested records and reports to Amoco.

On March 15, 1996, EPS discovered three USTs allegedly full of gasoline and water; strong petroleum odors allegedly emanated from the soils surrounding the USTs. EPS also allegedly discovered miscellaneous piping, a 45-gallon hydraulic oil reservoir, and a rectangular concrete containment structure on the Property.

On March 25, 1996, Amoco requested additional information. Amoco, however, did not volunteer to investigate or remediate the alleged contamination, but requested Avondale to perform additional tests and provide complete chemical analyses of specified petroleum markers. Avondale undertook the requested chemical analyses and provided the results on May 9, 1996.

On May 8, 1996, Avondale filed its original Complaint against Amoco. The 90-day notice period had expired in late April without any acknowledgment of liability or offer

by Amoco to perform the necessary remediation of the alleged contamination. Amoco did, however, request to participate in the excavation of the USTs and sampling process.

After Amoco allegedly refused to remediate the alleged endangerment caused by leaking USTs, Avondale allegedly informed Amoco that it was undertaking remediation and would hold Amoco responsible for the costs. Avondale entered a voluntary cleanup program offered by IEPA under which IEPA provided oversight and approval of Avondale's remediation plan.

On May 21, 1996, three USTs and associated piping, as well as the 45-gallon hydraulic oil reservoir were uncovered, pumped free of gasoline and water, excavated, cleaned, and transported off the Property. Soil remediation was completed in late 1996. Avondale has remediated the Property to the most stringent standards established by IEPA, the "Tier I Residential Cleanup Objectives."

On November 20, 1996, IEPA issued a "No Further Remediaton Letter" ("IEPA Letter"). The IEPA Letter states that IEPA reviewed the "Remedial Action Completion Report" for the Property and that the remedial action was completed in accordance with the "Remedial Action Plan." The IEPA Letter further states that its issuance "signifies a release from further responsibilities under the [Illinois Environment Protection] Act in performing the approved remedial action and shall be considered prima facie evidence that the remediation site . . . does not constitute a threat to human health and the environment and does not require

further remediation under the Act." (Def.'s 12(M) Stmt. at Ex. C.)

On November 22, 1996, Avondale transferred the Property to First Chicago. Accordingly, Avondale seeks recovery of the cleanup costs it incurred after properly invoking RCRA's statutory process. In addition, Avondale seeks an order requiring Amoco to remediate at its expense any future residual contamination on the Property or off-site migration of contamination therefrom. Avondale maintains that "[i]f excavation is ever performed under the streets adjacent to the Lake Forest Property, petroleum contamination will be found at levels requiring abatement to protect human health and the environment." (Pl.'s 12(N) Stmt. at ¶ 57.) Amoco moves for summary judgment.

II. DISCUSSION

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "An issue of fact is genuine only 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " *Smith v. Severn*, 129 F.3d 419, 426 (7th Cir. 1997) (*quoting Newell v. Westinghouse Elec. Corp.*, 36 F.3d 576, 578 (7th Cir. 1994)) (citation omitted).

Appendix C

"One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). When considering all the evidence presented in a motion for summary judgment, a court cannot make credibility determinations. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The court must "view the record and all reasonable inferences drawn from the record in the light most favorable to the non-moving party." *Sample v. Aldi, Inc.*, 61 F.3d 544, 546 (7th Cir. 1995).

"If the non-moving party bears the burden of proof on an issue, that party may not rest on the pleadings and must instead show that there is a genuine issue of material fact." *Id.* at 547. "[A] party will be successful in opposing summary judgment only when they present definite, competent evidence to rebut the motion." *Severn*, 129 F.3d at 427 (citations and internal quotation marks omitted). The non-moving party, therefore, will not survive summary judgment with merely a scintilla of evidence supporting its position. *See Essex v. United Parcel Serv., Inc.*, 111 F.3d 1304, 1308 (7th Cir. 1997).

"The question is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Severn*, 129 F.3d at 427. Accordingly, "if the evidence presented by the parties is subject to conflicting interpretations, or if reasonable minds could differ as to its significance," summary judgment must not be granted. *O'Connor v. Chicago Trans. Auth.*, 985 F.2d 1362, 1366 (7th Cir. 1993).

Appendix C

A. RCRA Claims

The citizen suits provision of RCRA states, in relevant part, that a citizen suit may be brought against any "past or present owner or operator of a . . . facility, who has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment. . . ." 42 U.S.C. § 6972(a)(1)(B). When a citizen suit is brought pursuant to § 6972(a)(1)(B), the District Court has jurisdiction: "[1] to restrain any person who has contributed or is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste referred to in paragraph (1)(B); [2] to order such person to take such other action as may be necessary; or [3] both. . . ." 42 U.S.C. § 6972(a).

In this case, Avondale seeks: (1) recovery of cleanup costs it incurred after properly invoking RCRA's statutory process ("restitution"); and (2) an order requiring Amoco to remediate at its expense any future residual contamination on the Property or off-site migration of contamination therefrom ("injunction"). With respect to the restitution sought, Amoco argues that it is entitled to summary judgment because RCRA does not authorize the recovery of cleanup costs incurred after properly invoking RCRA's statutory process. With respect to the injunction sought, Amoco argues that it is entitled to summary judgment because Avondale cannot show that an imminent and substantial endangerment to health or the environment currently exists.

Appendix C

1. *Restitution*

Recently, the Supreme Court held that "a private party cannot recover the cost of a past cleanup effort under RCRA." *Meghrig v. KFC W., Inc.*, 116 S. Ct. 1251, 1256 (1996). The Supreme Court, however, left open for the lower courts to determine whether a private party could recover cleanup costs incurred after properly commencing a RCRA citizen suit or invoking RCRA's statutory process. *Id.* Here, the court is asked to determine the issue the Supreme Court left open. In so doing, the court relies on the Supreme Court's opinion in *Meghrig*. *Id.* Although the *Meghrig* opinion was in the context of past cleanup costs, incurred before properly invoking RCRA's statutory process, the reasoning behind the Supreme Court's decision in *Meghrig* is equally applicable here. *See Agric. Excess and Surplus Ins. Co. v. A.B.D. Tank & Pump Co.*, No. 95 C 3681, 1996 WL 515088, at *2 (N.D. Ill. Sept. 6, 1996); *Andritz Sprout-Bauer, Inc. v. Beazer East, Inc.*, 174 F.R.D. 609, 618 (M.D. Penn. 1997).

In *Meghrig*, the Supreme Court concluded that costs for past cleanup efforts are not recoverable under RCRA for two reasons: (1) § 6972(a)(1)(B) permits a citizen suit if there is "an imminent and substantial endangerment to health or the environment" ("timing requirement"); and (2) § 6972(a) sets forth two remedies the District Court is authorized to provided in a suit brought pursuant to § 6972(a)(1)(B) ("remedy requirement"). *See Meghrig*, 116 S. Ct. at 1254. Based on the latter reason, remedy requirement, the court concludes that a private party cannot recover cleanup costs incurred after properly invoking

RCRA's statutory process. *See Agric. Excess*, 1996 WL 515088, at *2 ("[U]nder the Supreme Court's reasoning in *Meghrig*, this Court feels compelled to find that Plaintiff's also may not recover cleanup costs incurred after the invocation of RCRA's statutory process."); *Andritz*, 174 F.R.D. at 618 ("No framework has been provided by Congress for pursuing a private right of action for costs [incurred after invoking RCRA's statutory process], a clear signal that Congress did not intend to create such a cause of action."). *But see PMC, Inc. v. Sherwin-Williams Co.*, No. 93 C 1379, 1997 WL 223060, at * 13 (N.D. Ill. April 29, 1997) ("While it is clear from the case law that restitutionary relief for completed remediation efforts is not available, [citation omitted], there is no prohibition against recovery relating to contamination that has not been abated.").

Pursuant to § 6972(a), Congress authorized the District Court to order "a mandatory injunction, i.e., one that orders a responsible party to 'take action' by attending to the cleanup and proper disposal of toxic waste, or a prohibitory injunction, i.e., one that 'restrains' a responsible party from further violating RCRA." *See Meghrig*, 116 S. Ct. at 1254; *see also* 42 U.S.C. § 6972(a). Congress did not expressly authorize the District Court to award cleanup costs. *Cf. id.* If Congress so intended, "it knew how to provide for the recovery of cleanup costs, and . . . the language used to define the remedies under RCRA does not provide that remedy." *See Meghrig*, 116 S. Ct. at 1255.

As the Supreme Court noted in *Meghrig*, a comparison between the Comprehensive Environmental Response,

Compensation and Liability Act of 1980 ("CERCLA") and RCRA is telling. *Id.* at 1253-54. CERCLA was enacted several years after RCRA to address many of the same toxic waste problems addressed by RCRA. *Id.* at 1254. CERCLA was "designed to effectuate the cleanup of toxic waste sites or to compensate those who have attended to the remediation of environmental hazards." *Id.* at 1254. In order to achieve that purpose, Congress expressly provides for the recovery of cleanup costs in CERCLA. *Id.* at 1255.

RCRA, on the other hand, was designed " 'to minimize the present and future threat to human health and the environment' " and not to function as a "cost-recovery mechanism." *Id.* at 1254-55. As such, Congress did not expressly provide for the recovery of cleanup costs in RCRA nor intend to do so. *Cf. id.* at 1255; *see also* 42 U.S.C. § 6072(a). In *Meghrig*, the Supreme Court noted that "RCRA's enforcement scheme strongly support[ed]" its conclusion that RCRA does not authorize recovery of past cleanup costs. *Id.* at 1255. Specifically, the Supreme Court noted that "[u]nlike CERCLA, RCRA contains no statute of limitations . . . and it does not require a showing that the response costs being sought are reasonable." *Id.* (citations omitted). Similarly, the absence of these provisions support the conclusion that RCRA does not authorize the recovery of cleanup costs incurred after properly invoking RCRA's statutory provisions. *See Agric. Excess*, 1996 WL 515088, at *3.

In addition, under RCRA, a citizen suit can only be brought if the Environmental Protection Agency and the State choose not to commence and prosecute a separate

enforcement action. *See Meghrig*, 116 S. Ct. at 1255; *see also* 42 U.S.C. §§ 6972(b)(2)(B), (b)(2)(C). Hence, if RCRA authorized the recovery of past cleanup costs, only "[t]hose parties with insubstantial problems, problems that neither the State nor the Federal Government feel compelled to address, could recover their response costs, whereas those parties whose waste problems were sufficiently severe as to attract the attention of Government officials would be left without a recovery." *Meghrig*, 116 S. Ct. at 1255. Thus, the Supreme Court concluded that RCRA "would be a wholly irrational mechanism" for compensating for past cleanup costs because only parties cleaning up insubstantial waste problems could recover. *Id.*

Similarly, the court concludes that the RCRA "would be a wholly irrational mechanism" for compensating cleanup costs incurred after properly invoking RCRA's statutory process since only a party cleaning up "insubstantial" waste problems[2] could recover. *Cf. id.* To illustrate the irrationality, Party A needs to cleanup Site A. Party A invokes RCRA's statutory process, and the

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2. For purposes of the hypothetical, whether a waste problem is characterized as "substantial" or "insubstantial" is to connote whether the Government intervenes after receiving notice of the problem. *See* 42 U.S.C. § 6972(b)(2)(A) (before a citizen suit can be brought pursuant to RCRA, the Environmental Protection Agency and the State must be given an opportunity to file a civil action against the responsible party). An "insubstantial" waste problem is one that "neither the State nor the Federal Government feel compelled to address." *Meghrig*, 116 S. Ct. at 1255. A "substantial" waste problem is one that the Government does feel compelled to address. *Cf. id.*

Government decides not to intervene (an insubstantial waste problem). As a result, Party A can begin immediately thereafter to remediate the contamination and recover its costs from the responsible party. Consequently, Party A would have the option to begin the remediation process right away and recover its cleanup costs. In other words, Party A would not be required to wait until it wins its citizen suit.

By contrast, Party B needs to cleanup Site B. Party B invokes RCRA's statutory process, and the Government decides to intervene (a substantial waste problem). As a result, Party B would not incur any costs since it would be presumably incumbent upon the intervening Government officials to prosecute a separate enforcement proceeding against the responsible party. Consequently, Party B would be in the same position as if RCRA did not authorize recovery of cleanup costs. In other words, even if RCRA authorized recovery of cleanup costs, Party B would be required to wait until the Government wins its enforcement suit before any remediation of the alleged contamination can take place.

It is doubtful that Congress designed RCRA to allow Party A, cleaning up insubstantial waste problems, to recover cleanup costs incurred after properly invoking RCRA's statutory process while precluding Party B, cleaning up substantial waste problems, from recovering such costs. Furthermore, if RCRA authorized the recovery of cleanup costs incurred after invoking RCRA's statutory process, it would undermine the methodology that Congress employed to safeguard human health and the environment. *Cf. id.* at 1254 (RCRA's primary purpose is to "minimize

the present and future threat to human health and the environment.").

As the above illustration shows, if RCRA provides recovery of cleanup costs, Party A, remediating an insubstantial waste problem, can begin remediation immediately after invoking RCRA's statutory process and then recover its cleanup costs after the conclusion of its citizen suit. By contrast, Party B, remediating a substantial waste problem, would have to wait for the Government to win its enforcement suit before any remediation can take place. As a result, Party A's waste problem would be remedied faster than Party B's waste problem. It is unlikely that Congress intended to safeguard human health and the environment by employing a methodology that results in cleaning up insubstantial waste problems faster than substantial waste problems.[3]

Accordingly, based on the "limited remedies described in § 6972(a), along with the stark differences between the language of that section and the cost recovery provisions of CERCLA," the court concludes that RCRA "would be a wholly irrational mechanism" for compensating cleanup costs incurred after properly invoking RCRA's statutory

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3. The court assumes that Government intervention is more likely where a site is more dangerous to human health and the environment. That assumption was apparently shared by the Supreme Court in *Meghrig* when it used the terms "substantial" and "insubstantial" to conclude that RCRA "would be a wholly irrational mechanism" for compensating for past cleanup costs because only parties cleaning up insubstantial waste problems could recover. *See* 116 S. Ct. at 1255.

process. *Cf. id* at 1255-56; *see also Express Car Wash Corp. v. Irinaga Bros., Inc.*, 967 F. Supp. 1188, 1194 (D. Or. June 4, 1997) ("[T]he Supreme Court's logic in *Meghrig* indicates that, if squarely faced with the question at issue here, it would hold that RCRA does not allow a plaintiff to recover any costs for remediation substantially in place at the time of suit."); *Orange Env't, Inc. v. County of Orange*, 923 F. Supp. 529, 539 (S.D.N.Y. 1996) ("[T]he [*Meghrig*] opinion suggests that the Court would be reluctant to read into the RCRA remedies not clearly provided by Congress."); *cf. AM Int'l, Inc. v. Datacard Corp., DBS, Inc.*, 106 F.3d 1342, 1348 (7th Cir. 1997) (*citing Meghrig*, 116 S. Ct. at 1251 (RCRA does not allow a party to clean up site and sue for response costs in lieu of seeking an injunction)); *Nutrasweet Co. v. X-L Eng'g Corp.*, 926 F. Supp. 767, 771 (N.D. Ill. 1996) (J. Norgle) (This court opined that there is no private right of action under RCRA for the recovery of investigation and remediation costs, and that the plaintiff would have to seek such costs by bringing a state law tort claim.).

Avondale argues that such an interpretation results in a RCRA that is " 'a wholly irrational mechanism — and a wholly ineffective and unfair one — if a defendant like Amoco were to be allowed to escape its statutory duties and responsibilities simply by manipulating the RCRA process to evade them." (Pl's Resp. at 16.) This, however, is not the case. Under the courts interpretation of RCRA, a defendant like Amoco, assuming it is the responsible party, would not escape its statutory duties and responsibilities since a plaintiff like Avondale is entitled to bring a citizen suit to enforce remediation of the alleged contamination.

See Meghrig, 116 S. Ct. at 1254; *see also* 42 U.S.C. § 6972(a). Concluding that RCRA does not authorize the recovery of cleanup costs merely confirms that plaintiff cannot "clean up [a] site and sue for response costs in lieu of seeking an injunction." *Cf. AM Int'l, Inc.*, 106 F.3d at 1348 (*citing Meghrig*, 116 S. Ct. at 1251). Moreover, if plaintiff chooses to clean up the site in lieu of seeking an injunction, it can still pursue its cleanup costs against the responsible party under other federal or state laws. *See Meghrig*, 116 S. Ct. at 1256.

Therefore, the court grants Amoco's motion for summary judgment to the extent that Avondale seeks recovery of the cleanup costs it incurred after properly invoking RCRA's statutory process.

2. *Injunction*

Section 6972(a)(1)(B) provides that a citizen suit may be brought only upon showing that the solid or hazardous waste involved "may present an imminent and substantial endangerment to health or the environment." *See also Meghrig*, 116 S. Ct. at 1255. "The meaning of this timing restriction is plain: An endangerment can only be 'imminent' if it 'threaten[s] to occur immediately.' " *Id.* (citation omitted). " '[T]here must be a threat which is present now, although the impact of the threat may not be felt until later.' " *Id.* (*citing Price v. United States Navy*, 39 F.3d 1011, 1019 (1994)).

Avondale argues that it is entitled to an order compelling Amoco to remediate at its expense any future

residual contamination on the Property or off-site migration of contamination therefrom. According to Avondale, "[c]ontamination from Amoco's USTs is known to have migrated from the Property under adjacent streets, but it was not remediated as part of Avondale's abatement because IEPA did not require it." (Pl.'s Resp. at 27.) Additionally, Avondale asserts that "[i]f and when adjacent properties are excavated or otherwise disturbed, they will be found to be contaminated by petroleum from Amoco's USTs at level requiring abatement." *Id.* Therefore, Avondale argues that it is "entitled to injunctive and declaratory relief against Amoco . . . for contributing to existing off-site contamination that may in the future cause danger serious enough to require abatement." *Id.*

The court need not go any further than Avondale's own evidence and arguments to conclude that there is no imminent and substantial endangerment to human health or the environment. Avondale states that it seeks an order compelling Amoco to remediate at its expense "contamination that may in the future cause danger serious enough to require abatement." *Id.* There is no evidence to show that there exists any solid or hazardous waste that causes endangerment to human health or the environment now. *See Meghrig*, 116 S. Ct. at 1255 (*citing Price*, 39 F.3d at 1019).

This conclusion is further supported by IEPA's issuance of a "No Further Remediation Letter." The IEPA Letter states that its issuance "signifies a release from further responsibilities under the [Illinois Environment Protection] Act in performing the approved remedial action and shall

be considered prima facie evidence that the remediation site [the Property] . . . does not constitute a threat to human health and the environment and does not require further remediation under the Act." (Def.'s 12(M) Stmt. at Ex. C.)

Therefore, the court grants Amoco's motion for summary judgment to the extent that Avondale seeks an order compelling Amoco to remediate some future endangerment Amoco allegedly caused. *See also Foster v. United States*, 922 F. Supp. 642, 662 (D.D.C. 1996) ("While there can be no question that the levels of contamination present at the Site may warrant future response action, the plaintiff cannot establish either a current risk of 'substantial or serious' threatened harm, or 'some necessity for action.' ").

B. State Common Law Claims

Although the court concludes that RCRA does not authorize the recovery of cleanup costs incurred after properly invoking RCRA's statutory process, "RCRA does not prevent a private party from recovering its cleanup costs under other federal or state laws." *Meghrig*, 116 S. Ct. at 1256. However, having granted summary judgment for Amoco on Avondale's RCRA claims, the court declines to exercise supplemental jurisdiction over Avondale's state common law claims. *See* 28 U.S.C. § 1367(c); *see also City of Chicago v. Intern. College of Surgeons*, 118 S.Ct. 523, 533 (1997) (stating that pendent jurisdiction is a matter of discretion); *Van Harken v. City of Chicago*, 103 F.3d 1346, 1354 (7th Cir. 1997) (noting presumption against retention of supplemental state law claims); *Khan v. State Oil*, 93

F.3d 1358, 1366 (7th Cir. 1996) (same), *vacated on other grounds* 118 S. Ct. 275 (1997); *Vukadinovich v. Bd. of School Trustees of Michigan,* 978 F.2d 403, 415 (7th Cir. 1992) ("It is well established that if federal claims are dismissed before trial, the federal district courts should generally dismiss the state law claims as well."); *Wright v. Associated Ins. Co., Inc.*, 29 F.3d 1244, 1251-530 (7th Cir. 1994) (same, but noting three exceptions). Therefore, the court dismisses Counts III and IV, and denies Amoco's motion for summary judgment as to these counts.

III. CONCLUSION

For the foregoing reasons, the court grants Amoco's motion for summary judgment as to Counts I and II, and dismisses Counts III and IV. Case is terminated.

IT IS SO ORDERED.

ENTER:

s/ Charles R. Norgle, Sr.
CHARLES RONALD NORGLE, SR., Judge
United States District Court

DATED: 3-19-98

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED MARCH 23, 1998 AND DOCKETED MARCH 24, 1998

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

Case Number: 96 C 2762

AVONDALE FEDERAL SAVINGS BANK

v.

AMOCO OIL COMPANY

JUDGMENT IN A CIVIL CASE

* * *

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that summary judgment is granted in favor of Defendant, Amoco Corporation and against plaintiff, Federal Savings Bank on Counts I and II and Count III and IV are hereby dismissed.

Michael W. Dobbins, Clerk of Court

s/ Eric Fulbright

Date: 3/23/98 Eric Fulbright, Deputy Clerk

APPENDIX E — AMENDED ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED APRIL 30, 1999 AND AMENDED MAY 4, 1999

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

AMENDED May 4, 1999
April 20, 1999

Before

Hon. William J. Bauer, *Circuit Judge*

Hon. Diane P. Wood, *Circuit Judge*

Hon. Terence T. Evans, *Circuit Judge*

No. 98-2003

AVONDALE FEDERAL SAVINGS BANK,

Plaintiff-Appellant,

v.

AMOCO OIL COMPANY,
a Maryland corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 96 C 2762

Charles R. Norgle, Sr., Judge

Appendix E

ORDER

On March 24, 1999, the plaintiff-appellant filed a petition for rehearing with suggestion for rehearing en banc. All the judges on the original panel have voted to deny the petition, and none of the active judges* have requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

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* The Honorable Walter J. Cummings and Honorable John L. Coffey took no part in the consideration of the suggestion for rehearing en banc.